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In The

Supreme Court of the United States

October Term, 1994

WILFORD HENRY NIECE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Sentencing Guidelines in effect at the time of a re-sentencing must be applied when a Defendant's previous sentence has been vacated in its entirety?

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Wilford Niece seeks review of his re-sentencing from December 7, 1993, as affirmed by the Sixth Circuit Court of Appeals in *United States v. Niece*, No. 93-6636 (6th Cir. December 7, 1994) (Per Curiam). [R. 144]. A copy of this opinion is attached as Appendix B and is hereafter referred to as "*Niece II*". The judgment of the United States District Court for the Eastern District of Kentucky, including the modification following resentencing [R. 130], is attached as Appendix C. The first opinion of the court of appeals, which remanded for resentencing, *United States v. Niece*, No. 93-5011, (6th Cir. October 19,1993) (Per Curiam) [R. 126], is attached as Appendix D and is hereafter referred to as "*Niece I*". The opinion of the Sixth Circuit Court of Appeals denying the Petition for Rehearing is attached as Appendix A. The original judgment of the United States District Court is attached as Appendix E.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals, which forms the basis for this Petition for Certiorari, was entered on December 7, 1994. The Petition for Rehearing was denied on January 19, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Title 18, U.S.C. § 3553(a)(4); U.S.S.G. § 1B1.11; Title 18 U.S.C. § 3742(e), (f); Federal Rule of Criminal Procedure 35(a), attached as Appendix F.

STATEMENT OF THE CASE

A. Judicial History

The Petitioner Wilford H. Niece maintains that all applicable

law requires that in every resentencing proceeding, the district courts, absent some limited exceptions, must apply the sentencing guidelines in effect on the date of the resentencing. This case concerns the district court's failure to apply the appropriate sentencing law at a resentencing following a complete vacation of the previous sentence.

Wilford H. Niece, appealed his original sentence, which resulted in the sentence being vacated in its entirety. In its opinion, The United States Court of Appeals for the Sixth Circuit stated: "We shall vacate the sentence in its entirety . . . ." Appendix, 30a-31a. Upon remand, the district court refused to use the guidelines in effect on the date of resentencing. Instead, the district court judge followed those guidelines in effect at the time of the first sentencing. The outdated guidelines required the calculation of a sentence more punitive to Mr. Niece than the guidelines in effect on the date of his resentencing.

Mr. Niece appealed his sentence for a second time, specifically challenging the district court's use of a guideline which had been amended by the Sentencing Commission. The Sixth Circuit rejected Mr. Niece's appeal, stating that its previous decision to "vacate the sentence in its entirety," was ambiguous, reasoning that the district court could apply the outdated guidelines.

Mr. Niece now petitions this Court for relief, asking this Court to remand this case to the Sixth Circuit, with directions to vacate his sentence in its entirety yet again, and order resentencing under the Federal Sentencing Guidelines in effect on the date of resentencing.

B. Factual History

On October 2, 1992, Wilford Niece was convicted of transporting a minor interstate with intent to engage in sexual

activity, in violation of 18 U.S.C. § 2423. Following the jury trial conducted before the Honorable Judge Joseph Hood, United States District Judge for the Eastern District of Kentucky, Judge Hood sentenced Mr. Niece on December 22, 1992, to a sentence of seventy-two (72) months and imposed a fine of $75,000.00. [R. 96]. This sentence was imposed under the Federal Sentencing Guidelines effective November 1, 1990, which were the guidelines in effect at the time of the offense. The district court judge, the assistant United States Attorney, the probation officer, and the Defendant had all incorrectly agreed that application of the 1992 version of the Federal Sentencing Guidelines would create an *ex post facto* problem and therefore the court applied the guidelines in effect at the time of the charged offense.

At sentencing, the court fixed the base offense level at sixteen (16) using U.S.S.G. § 2G1.2. This base offense level was adjusted upwards by two (2) points under U.S.S.G. § 2G1.2(b)(3), because the victim was under sixteen "but over twelve" years of age. An additional upward adjustment of four (4) points was made under U.S.S.G. § 2G1.2(b)(1), due to the use of "economic" coercion. The court then added two (2) points under U.S.S.G. § 3A1.1 for victim vulnerability and, finally two (2) points were added under U.S.S.G. § 3C1.1 for obstruction of justice.

After all adjustments the court arrived at a total offense level of twenty-six (26). Using the guidelines range of a criminal history category of I, this resulted in a possible sentence of sixty-three (63) to seventy-eight (78) months of imprisonment. Within this range, the court imposed a prison sentence of seventy-two (72) months and a fine of $75,000.00. [R. 96].

On December 29, 1992, Mr. Niece filed his Notice of Appeal and he appealed both his conviction and sentence[1] to the United

1. Mr. Niece does not challenge the affirmance of his conviction or the resolution of sentencing issues not implicated in this appeal.

States Court of Appeals for the Sixth Circuit. No. 93-5011. [R. 99]. He challenged his sentence on five grounds, three of which are relevant to this petition:

(1) that the district court should not have applied the 1990 version of the Sentencing Guidelines, but rather the 1992 version which was in effect at the time of sentencing;

(2) the upward adjustment of four (4) levels under U.S.S.G. § 2G1.2(b)(1) for "economic coercion" was improper; and

(3) the fine was imposed without proper findings by the court.

The Sixth Circuit affirmed Mr. Niece's conviction but vacated his sentence, stating explicitely that Mr. Niece's sentence was **vacated in its entirety**. *Niece I*, Appendix, 30a-31a. Specifically, the court found that the four-point enhancement for economic coercion under U.S.S.G. § 2G1.2 was inappropriate. The court found it unnecessary to resolve issues connected with the calculation of the fine, because the court concluded "in view of the fact that a resentencing is required in any event, we need not address this claim". *Niece I*, Appendix, 30a.

Because Mr. Niece did not specifically object to the use of the 1990 version of the guidelines at the time of sentencing, Mr. Niece was deemed to have waived any objection to the use of the that version. However, the court's opinion in *Niece I* states clearly and in more than one place that the original sentence was set aside completely.

On page one (1) of the opinion, Appendix, 11a, the panel wrote:

> the Appellant's offense level was

> miscalculated, . . . [and] we shall remand the case for resentencing.

On page twenty (20), Appendix, 30a-31a, while discussing the fine, the opinion states:

> In view of the fact that a resentencing is required in any event, we need not address this claim. We shall vacate the sentence in its entirety, ...

The Opinion concludes with this sentence:

> The conviction is **AFFIRMED**, the sentence is **VACATED**, and the case is **REMANDED** for resentencing.

Niece I, Appendix, 31a.

The district court resentenced Mr. Niece on December 7, 1993. The court calculated the sentence under the same 1990 edition of the Sentencing Guidelines, but without the four-point upward adjustment under U.S.S.G. § 2G1.2(b)(1). The new offense level of twenty-two (22), rather than the original level twenty-six (26), called for a range of imprisonment of forty-one (41) to fifty-one (51) months, and the court set Mr. Niece's sentence at the maximum of fifty-one (51) months and imposed a fine of $60,000. This Modified Judgment was entered on December 9, 1993 [R. 130] and, on December 16, 1993, Mr. Niece timely filed his notice for his second appeal. [R. 133].

In his second appeal, Mr. Niece argued that when a sentence is vacated in its entirety, any subsequent resentencing is *de novo*. Following the command of 18 U.S.C. § 3553(a)(4), the resentencing court must use the guidelines in effect at the time of resentencing,

unless they present *ex post facto* problems. In an opinion dated December 7, 1994, a different panel of the United States Court of Appeals for the Sixth Circuit rejected Mr. Niece's appeal and affirmed the resentencing. *Niece II.*

The panel in *Niece II* acknowledged that resentencing is normally done under the Federal Sentencing Guidelines in effect on the date of resentencing, Appendix, 6a, and that resentencing after a vacated sentence is normally a *de novo* sentencing. *Id.* The court noted that there is an exception "where the resentencing court's authority is **explicitly** limited by the appellate court's mandate," and that "the appellate court may limit such authority by **specific** instruction." *Id.* (emphasis added).

However, in almost complete disregard of its own reasoning, the circuit court then held that the clear and express language of *vacatur* was ambiguous and that the district court "understood" the resentencing mandate as requiring only a mathematical recalculation under the 1990 version of the guidelines.

During oral arguments before the court of appeals, Judge Guy admonished counsel that by reading between the lines in *Niece I*, he was able to understand that opinion. This "logic" was carried over into the court's opinion in *Niece II* when the court reasoned that the mandate from *Niece I* was

> admittedly ambiguous. It contains language explicitly upholding portions of the sentence, language vacating it in its entirety, and specific instruction, impliedly based on the 1990 version of the guidelines, concerning the appropriate offense level and guideline range to be employed and fact findings to be made .... Although the remand order does not expressly direct the district court to

> apply the 1990 version of the guidelines, it contains implied limitation to this effect.

Niece II, Appendix, 6a-7a.

In response to the opinion in *Niece II*, Mr. Niece filed a Petition for Rehearing In Banc on December 21, 1994. By the January 19, 1995 order, the court denied the request for rehearing in banc, treating it as well as a request for rehearing before the same panel and denying same.

The district court's failure to conduct resentencing under the correct guidelines resulted in a sentence of imprisonment for Mr. Niece which was as least five (5) but up to twenty-one (21) months too high.

Under the guidelines used at his first sentencing, Mr. Niece's base offense level was sixteen (16), according to U.S.S.G. § 2G1.2. This was enhanced two levels due to age (U.S.S.G. § 2G1.2(b)(3)), and four levels for economic coercion (U.S.S.G. § 2G1.2(b)(1)), two levels for victim vulnerability (U.S.S.G. § 3A1.1) and two levels for obstruction of justice (U.S.S.G. § 3C1.1), for a total offense level of twenty-six (26).

At resentencing, under the same guidelines but without the economic coercion enhancement, the court calculated a total offense level of twenty-two (22).

However, had the version of the guidelines in effect at the time of resentencing been followed, Mr. Niece would have been entitled to apply U.S.S.G. § 2G1.2(c)(3)'s cross-reference to U.S.S.G. § 2A3.2. This would have resulted in reducing the base offense from a level of sixteen (16) to a level fifteen (15).

At the original sentencing hearing, the mistake in interpreting U.S.S.G. § 2G1.2 came as result of the (b)(4)

provision added to the 1992 version, which appeared to cause an *ex post facto* enhancement. However, all concerned failed to recognize that the application of the added new cross reference of (c)(3) within that same version, would have negated the impermissible increase.

Therefore at the December 7, 1993 resentencing the correct guidelines would have been the November 1, 1993 version. Within that version, U.S.S.G. § 2Gl.2 contains the cross-reference under subsection (c)(3) to U.S.S.G. § 2A3.2. U.S.S.G. § 2A3.2 has a base offense level of 15, one point lower than the base offense level under U.S.S.G. § 2Gl.2.

Even if, for argument sake, the base offense level set under U.S.S.G. § 2A3.2 were adjusted upward under U.S.S.G. § 3Cl.l and U.S.S.G. § 3Al.l, as applied at his previous sentencing, the resulting offense level is 19. At that offense level, the range of imprisonment is thirty (30) to thirty- seven (37) months. Under U.S.S.G. § 2A3.2(b)(1) is a specific offense characteristic which effectively mirrors the U.S.S.G. § 2G1.2(b)(4) offense characteristic which had been mistakenly construed as *ex post facto.*[2] Then, even if this two (2) point adjustment under U.S.S.G. § 2A3.2(b)(1) applies, where the victim was in the custody, care, or supervisory control of the defendant, the offense level would be 21, with a range of imprisonment of thirty-seven (37) to forty-six (46) months. Thus, Mr. Niece's sentence was anywhere from five (5) to twenty-one (21) months too high, depending on the offense level used and the sentence imposed within those ranges. However, upon resentencing, if the district court would reject the application of the U.S.S.G. § 2Gl.2(c)(3) cross reference, it is admittedly possible that Mr. Niece would receive precisely the same sentence he is currently serving. But at least the resentencing would be done according to law.

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2. However, under U.S.S.G. § 2A3.2 application this would not have been an *ex post facto* issue, in that the section 2A3.2(b)(1) provision was also present in the offense date version of the guidelines.

REASONS FOR GRANTING THE PETITION

I.

THE FAILURE BY THE DISTRICT COURT TO APPLY THE FEDERAL SENTENCING GUIDELINES IN EFFECT ON THE DATE OF RESENTENCING, CIRCUMVENTS THE PLAIN MEANING OF 18 U.S.C. § 3553(a)(4) AND THE DECISIONS OF NINE OTHER FEDERAL CIRCUITS.

The Sentencing Reform Act of 1984, Public Law 98-473, codified at 28 U.S.C § 991, established the United States Sentencing Commission and set forth its purposes. Section 991(b)(1)(B) states that the motives include "provid[ing] certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences . . . ." With these principles in mind, the significance of resentencing after a vacated sentence comes into focus.

The same motivation for uniformity must apply equally as well to resentencing as to the original sentencing. If there is no uniformity in how sentences are calculated, with resentences varying within a circuit and from circuit to circuit, then the guidelines will fail to achieve the stated purpose. Sentences will not be fair and certain, with the vagaries of each circuit determining how a defendant will be resentenced. The incorrect application of the guidelines is anathema to a constitutional application of the guidelines and would render the entire sentencing system as unjust.

Title 18 U.S.C. § 3553(a)(4) mandates that district courts use

the version of the Sentencing Guidelines "that are in effect on the date the defendant is sentenced." U.S.S.G. § 1B1.11 enacts this requirement, with the provision that *ex post facto* problems be avoided. That is to say, the guidelines in effect at sentencing should not be more severe than those in effect on the date of the offense of conviction. U.S.S.G. § 1B1.11(b)(1). Neither the statute nor the Guidelines distinguish between sentencing and a resentencing of any kind, let alone a remand for resentencing following a complete vacation of a prior sentence. Therefore, a resentencing must be considered the same as an original sentencing hearing when using the guidelines.

Following the logic of this requirement, nine circuits explicitly have held that resentencings are to be carried out under the guidelines in effect on the date of resentencing, absent any *ex post facto* concerns. *See, e.g., United States. v. Doe,* 18 F.3d 41, 43 (1st Cir. 1994); *United States v. Bermudez,* 974 F.2d 12, 14 (2d Cir. 1992); *United States v. Kopp,* 951 F.2d 521, 531, n. 16 (3rd Cir. 1991); *United States v. Gross,* 979 F.2d 1048, 1052 (5th Cir. 1992); *United States v. Edgar,* 971 F.2d 89, 93 n.4 (8th Cir. 1992); *United States v. Fagan,* 996 F.2d 1009, 1018 (9th Cir. 1993); *United States v. Ziegler,* 39 F.3d 1058, 1063-1064 (10th Cir. 1994); *United States v. Munoz-Realpe,* 21 F.3d 375, 377 n.4, (11th Cir. 1994); *United States v. Hicks,* 978 F.2d 722, 726 (D.C. Cir. 1992).

In the case before the Court, the Sixth Circuit acknowledged this rule, citing *Fagan,* but recognized an exception when the resentencing court's authority is explicitly limited by the appellate court's mandate. *Niece II,* Appendix, 6a. The mandate from Mr. Niece's first appeal did not contain an explicit limitation of the resentencing to be conducted by the district court. Instead, the Sixth Circuit's opinion stated, and restated, that the original sentence was vacated. This should have resulted in a *de novo* resentencing.

At resentencing, the district court permitted Mr. Niece to be present, but would not consider any arguments regarding the appropriate guidelines to be applied, nor would the court allow any testimony to be taken. In fashioning the "new" sentence, the district court discarded its own previous economic coercion enhancement, pursuant to the Sixth Circuit's decision and arrived at the final sentence through a mere arithmetical calculation. Then, the district court considered the matter of a fine, ordering a lesser fine than had been initially imposed, and changed the payment terms.

In other words, the court of appeals allowed the district court to treat Mr. Niece's resentencing in part as a *de novo* sentencing, and in part as merely a sentence modification. The district court's actions clearly violated the commands of 18 U.S.C. § 3553(a)(4) and U.S.S.G. § 1B1.11. This hybrid procedure was neither ordered by the Sixth Circuit in *Niece I* nor implied by the nature of its remand, which expressly stated that the first sentence was vacated in its entirety.

To date nine circuits have held that resentencing is to be had under the guidelines in effect at resentencing and the following examples clearly detail the logic involved.

United States v. Ziegler, 39 F.3d 1058 (10th Cir. 1994), most squarely addresses the issues presented in *Niece II*. In *Ziegler*, the Tenth Circuit reversed, for a second time, the district court's downward departure.

> Because we are remanding for resentencing, the district court will be governed by the guidelines in effect at the time of resentence .... This result would be different if this court's remand was "a narrowly confined request for an explanation of the court's

> reasons for imposing [a] sentence," rather than "an order direct[ing] the sentencing court to begin anew." In the former case, the sentencing court would apply the guidelines in effect at the time of initial sentencing, presuming no *ex post facto* problems, because the district court is being asked "merely to clarify the record of the initial sentencing proceeding." In the latter case, in contrast, when a sentence is ordered vacated and the matter is remanded for resentencing, "the defendant reappear[s] before the court . . . with a 'clean slate,' " being "'placed in the same position as if he had never been sentenced.' "

Id. at 1063-64 and n.2 (citations omitted).

With this language, the Tenth Circuit succinctly stated the approach Mr. Niece has advocated. That approach may be divided into a three-part procedure:

(1) there is a difference between a remand with instructions and a complete vacation of a sentence;

(2) when a sentence is vacated in its entirety, resentencing proceeds *de novo;* and

(3) resentencing is conducted under the guidelines in effect on the date of resentencing.

A district court opinion, cited in *Ziegler,* also follows this approach. In *United States v. Ekhator,* 853 F.Supp. 630 (E.D.N.Y. 1994), the district court had to consider a remand specifically instructing it to indicate on the record whether it understood its

authority to depart downward. The opinion discusses at some length "the legal significance of the Circuit Court's order *vacating* the judgment and remanding for sentencing," *Id.* at 634, and compares cases which remanded for reconsideration. The court concluded that in a case following the entire vacation of a sentence, **"the defendant is regarded as standing before the court with a clean slate."** *Id.* at 636 (emphasis added). *See also, United States v. Ekwunoh,* 1994 WL 702035 (E.D.N.Y. Dec. 9 1994) (on remand after vacated sentence, sentencing is *de novo,* and guidelines in effect on date of resentencing apply, making newly enacted 18 U.S.C. § 3553(f) a "safety valve" available to defendant).

A decision of the Eleventh Circuit, *United States v. Munoz-Realpe,* 21 F.3d 375 (11th Cir. 1994), also addressed the twin issues of the scope of a sentencing proceeding after a vacation and remand, and which edition of the Guidelines to apply. The Eleventh Circuit took it for granted that a remand on a downward departure issue alone called for a complete resentencing, and that the resentencing court would apply the guidelines in effect on the date of resentencing. Similar to the reduction in sentence afforded in *Ekhator,* the Eleventh Circuit found a reduction appropriate when it wrote:

> In this case, a successful appeal by the government on this issue would require resentencing, and under these circumstances we think it is clear any such resentencing should employ the now effective lenient definition of cocaine base.

Id. at 377, 377 n.4. *See also, United States v. Camacho,* 40 F.3d 349, 354 (1994); *United States v. Bush,* 28 F.3d 1084, 1087-1088 (11th Cir. 1994).

In *Munoz-Realpe,* the Eleventh Circuit reached the only conclusion logical under the Federal Sentencing Guidelines and the rules applicable to resentencing following a complete vacation of sentence: resentencing after a vacated sentence is to be *de novo,* and employs the guidelines in effect on the date of resentencing.

The Sixth Circuit opinion in *Niece II* side-stepped the body of case law, statutory and Sentencing Guidelines authority which requires application of guidelines in effect on date of resentencing. The Sixth Circuit let stand the decision of the district court to sentence Mr. Niece in a *quasi de novo* proceeding, without regard to the guidelines in effect on the date of his resentencing. This decision by the Sixth Circuit, is in direct conflict with the growing body of law on this issue, not yet ruled upon by this Supreme Court.

Interestingly, even among the circuits that have held clearly that upon remand for resentencing, a district court must use the version of the Guidelines in effect on the date of resentencing, there remains some confusion. In *United States v. Garcia-Cruz,* 40 F.3d 986 (9th Cir. 1994), the defendant appealed the sentence he received upon resentencing from an earlier remand. The appellant complained that the district court had resentenced him under the Guidelines in effect on the date of his original sentencing, instead of the guidelines in effect on the date of the offense. The Ninth Circuit, citing *Fagan,* discussed the issue as follows:

> We have three choices here: the 1988 Guidelines in effect at the time of the offense; the 1990 Guidelines in effect at the time of the original sentencing; and the 1992 Guidelines in effect at the time of the resentencing.

Id. at 987-988 (footnote omitted). The case turned on the proper construction of U.S.S.G. § 4B1.1, the effect of subsequent amendments and the decision in *Stinson v. United States*, __ U.S. __, 113 S. Ct. 1913 (1993).

The fact that the *Garcia-Cruz* court even entertained the comparison of three versions of the Guidelines is disturbing. 18 U.S.C. § 3553(a)(4) and U.S.S.G. § 1B1.11 require the use of the Guidelines in effect on the date of sentencing, absent *ex post facto* concerns, whether it be a resentencing or initial sentencing. If, in fact, the second sentencing of Garcia-Cruz was truly *de novo*, the district court should have only compared the version in effect on the date of resentencing to the version in effect on the date the offense was committed.[3] There appears to be no authority for the third option, the Guidelines in effect on the date of the first sentencing. Garcia-Cruz demonstrates the confusion and lack of uniformity which can arise from remand and resentencing under the ever-changing Sentencing Guidelines.

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3. *Cf.*, U.S.S.G. § 1B1.11, comment (backg'd):

> Consequently, even in a complex case involving multiple counts that occurred under several different versions of the Guidelines Manual, it will not be necessary to compare more than two manuals to determine the applicable guideline range — the manual in effect at the time the last offense of conviction was completed and the manual in effect at the time of sentencing.

II.

THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS AS TO THE NATURE AND SCOPE OF THE PROCEEDING AFTER AN APPELLATE COURT HAS VACATED AN ORIGINAL SENTENCE IN ITS ENTIRETY AND REMANDED FOR RESENTENCING.

The opinion of the Sixth Circuit in *Niece II* considered the meaning and effect of its earlier opinion which vacated Mr. Niece's sentence and remanded for resentencing. *Niece II* concluded that, despite language in *Niece I* that explicitly vacated the original sentence in its entirety, other language in *Niece I* might be construed as permitting the district court to apply the 1990 version of the Guidelines. This construction of the Sixth Circuit's mandate in *Niece I* creates confusion where there was clarity, and conflicts with the practice in other federal circuits, which is that resentencing after a vacated sentence is *de novo*. *See United States v. Maldonado*, 996 F.2d 598, 599 (2nd Cir. 1993); *United States v. Moree*, 928 F.2d 654 (5th Cir. 1991); *United States v. Atkinson*, 979 F.2d 1219, 1223 (7th Cir. 1992); *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992); *United States v. Caterino*, 29 F.3d 1390, 1395 (9th Cir. 1994); *United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 225 (1991); *United States v. Veteto*, 980 F.2d 697, 698 (11th Cir. 1993).

However the issue has arisen, the rule is that a resentencing following vacation of sentence is *de novo*. For example, in *Maldonado*, the Second Circuit addressed the right of the defendant to be present and allocute at a resentencing following vacation, under Rule of Criminal Procedure 32. *Ekhator*, 853 F. Supp. 630, found no reason to treat a sentence vacated on any other ground differently. *Id.* at 634, *citing Maldonado*, 996 F.2d at 599.

In *Moree*, the Fifth Circuit considered the appeal of a defendant who was resentenced *in abstentia*. In ruling that the defendant had a right to be present at his resentencing, the court found that the mandate of the first appeal, which vacated the sentence and remanded for further proceedings, left no sentence in effect. In other words, the district court was not free to modify or reduce the defendant's sentence by the two-level enhancement found improper by the appellate court. Since no sentence was in effect, there was nothing for the district court to modify. 928 F.2d at 655.

In *United States v. Barnes*, 948 F.2d 325 (7th Cir. 1991), the Seventh Circuit, in finding that a defendant has right of allocution at resentencing, explained that at a resentencing, a new sentencing determination was to be made and that a defendant appeared at resentencing with a clean slate. *Id.* at 330. In *Atkinson*, the Seventh Circuit again used the "clean slate" language, and held that at a resentencing following a vacated sentence, the district court "may entertain any and all objections, even those not raised at the earlier sentencing." 979 F.2d at 1223. *See also, United States v. Johnson*, 1995 WL 32001 (7th Cir. January 30, 1995) (upon vacating sentence and remanding for resentencing to explain enhancement under U.S.S.G. § 3A1.3, district court free to begin sentencing anew, including upward departure).

In *Caterino*, 29 F.3d 1390 (9th Cir. 1994), the defendant's first sentence was vacated because of improper application of multiple vulnerable victim adjustments. In the second appeal, the court noted that the remand order, which read simply "we therefore VACATE . . . Caterino['s] sentence[ ] and REMAND for resentencing,"

> did not *expressly* limit the district court to correcting the vulnerable victim adjustment. The only question was whether there was any

> *implied* limitation, given that no other error was deemed sufficient to warrant a remand . . . But neither Caterino, the government, nor the district court has adopted such a limited interpretation of the remand order. Rather, everyone has interpreted the order broadly enough to authorize a *de novo* review of the sentencing factors.

Id. at 1394-95.

Thus, even though the original sentence was remanded on the sole issue of the propriety of vulnerable victim adjustments, the Ninth Circuit interpreted a resentencing after a vacated sentence to be *de novo*, permitting the defendant to raise issues that were not part of the reason for reversal.

In *Smith*, 930 F.2d 1450, the Tenth Circuit held that an order vacating a sentence and remanding for resentencing directs the lower court to begin anew. In that circumstance, a *de novo* resentencing is appropriate. In *United States v. Ortiz*, 25 F.3d 934 (10th Cir. 1994), the court explained that the *de novo* resentencing contemplates the introduction of any relevant evidence the court could have heard at the first sentencing hearing. *Id.* at 935. *See also, Ziegler.*

In *Veteto*, 980 F.2d 697, the defendant's first appeal resulted in a vacated sentence and remand because the district court had imposed a sentence without stating its reason for choosing a specific point within the guideline range. *Id.* at 698. At resentencing, the district court proceeded *de novo.*

> We could have left the sentence in effect and remanded for the limited purpose of the trial court's giving a statement of reasons. But we

> did not do that. We vacated the sentence, which left no sentence in effect, and remanded for "resentencing consistent with this opinion." We recognize the arguable ambiguity in the phrase "consistent with this opinion," since the opinion had been devoted to statement of reasons. The fact remains that the sentence was vacated and defendant was to be resentenced with sufficient statements of reason given.

980 F.2d at 698. Thus, in *Veteto*, the only reason for the remand for resentencing was that the court had not stated its foundation for choosing a point within the Guideline range. The Eleventh Circuit held that absent an express limitation on the scope of resentencing, the resentencing **must** be *de novo*.

The relevant published decisions of the Sixth Circuit seem to follow the majority of the other federal circuits, but the panel's decision in *Niece II* is in direct conflict. On December 14, 1994, seven days after its decision in *Niece II*, the same panel of the Court of Appeals for the Sixth Circuit decided *United States v. Duso*, 42 F.3d 365 (6th Cir. 1994). Duso's first appeal resulted in a remand for resentencing, because the district court used an improper method to calculate the defendant's criminal history category. In the first paragraph of the opinion, the panel in the first appeal announced its intention to "vacate the sentence imposed on Lawrence Duso and remand for resentencing." *United States v. Duso*, 1993 WL 131940 (6th Cir. April 27, 1993), at *1. The court concluded its discussion of the criminal history category issue as follows:

> Upon remand, the court may consider whether the facts recited warrant an upward adjustment under § 4A1.3 or any other

> Guidelines provision (e.g., § 3C1.1 for obstruction of justice for subornation of perjury). Because of the improper method used to calculate the "accurate" criminal history category and its inseparability from the other bases for the adjustment, we remand Lawrence Duso's case to the district court for resentencing.

Id. at *8. The opinion's concluding paragraph included the phrase "Lawrence Duso's conviction is AFFIRMED but his sentence is VACATED and REMANDED for resentencing . . ." *Id.* at *11.

At resentencing, the district court decided to recompute the base offense level of the defendant. The defendant objected, but after a total of three resentencing hearings, the court sentenced the defendant to a sentence longer than that to which he was originally sentenced. The defendant appealed, arguing that the trial judge increased his sentence out of vindictiveness. In upholding the district court's sentence, the Sixth Circuit wrote:

> If the defendant convinces the court on appeal that the sentence was wrongly computed and the court remands for resentencing, *there appears to be no prohibition in the guidelines, or in the case law interpreting the guidelines, keeping a district judge from revisiting the entire sentencing procedure unless restricted by the remand order.* It is possible, as occurs in many cases, that the remand would be a limited one which would not allow the district judge to make a *de novo* review of the sentencing procedure. In this case, however, there was no such language in the opinion limiting the district judge's

> review .... This case is relatively typical, however, in that this court's earlier holding left room for the district judge to revisit the entire sentencing procedure.

42 F.3d at 368 (emphasis added).

The sole reason for the remand and resentencing was the district court's improper method used to calculate the defendant's criminal history category. Even though the case was remanded for resolution of a limited issue, the Sixth Circuit recognized that resentencing must be *de novo*.

In another Sixth Circuit case, *United States v. Moored*, 38 F.3d 1419 (6th Cir. 1994), the defendant appealed his resentencing because the district court took the opportunity offered by the resentencing to recalculate the amount of loss attributable to the fraud for which he was convicted. The issue of the amount of loss had not been appealed by either the defendant or the government in the first appeal. The Sixth Circuit held that the mandate of the first appeal, which vacated the judgment of the district court and remanded for resentencing,

> did not prohibit the district court from reconsidering the loss issue in reversing its earlier decision regarding same . . . Where, as here, the district court felt constrained to reconsider the loss issue to sentence Defendant in accordance with the law, we feel that this court's interest in truth, justice and fair sentencing, requires that the district court's decision to reopen the loss issue be upheld.

Id. at 1422-23. *Moored* was decided after oral argument in *Niece II*, and is cited in the panel's per curiam opinion in *Niece II*.

It is obvious that the decision in *Niece II* conflicts with the Sixth Circuit's own practice, as well as that of other federal circuits.

In contrast to the majority of federal circuits and adding to the confusion on this issue, the Fourth Circuit takes a more restrictive view of proceedings following a remand for resentencing. *See United States v. Apple*, 962 F.2d 335 (4th Cir. 1992); *United States v. Bell*, 5 F.3d 64 (4th Cir. 1993) (district court cannot *sua sponte* vacate judgement in order to depart downward).

The variety of procedures followed in sentencing proceedings after a remand, have resulted in a lack of uniformity for a minority of the circuits and has created uncertainty in the sentencing calculus. While the majority of circuits treat a resentencing after a vacated sentence as *de novo*, the Sixth Circuit in particular, seems inconsistent and out of step in its handling of the issue.

CONCLUSION

The relationship among the sentencing statutes and guidelines, the sentencing power of the district courts, and the instructions from appellate decisions remanding for resentencing, has not been addressed by this court. With the continued amendments to the Sentencing Guidelines, the growing number of sentencing proceedings conducted after remands, and the developing case law, the question of the proper interplay between appellate court mandates, the Sentencing Guidelines, and 18 U.S.C. § 3553(a)(4) is ripe for review.

In this case, Wilford H. Niece has never been sentenced under the correct guidelines. He is petitioning this court, to rule that the sentencing laws must be uniformly applied across the land, in order to insure that the sentencing system has any credibility and constitutional validity.

THEREFORE, the petitioner prays that this court accept his Petition for Certiorari to ultimately reverse the opinion of the Sixth Circuit Court of Appeals, remanding with instructions that Wilford H. Niece be afforded a correct sentence under the Federal Sentencing Guidelines in effect on the date of his resentencing.

Respectfully submitted,

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APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JANUARY 19, 1995

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-6636

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILFORD HENRY NIECE,

Defendant-Appellant.

ORDER

BEFORE: GUY and BATCHELDER, Circuit Judges; and McKEAGUE,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and

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* Hon. David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation

concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk *se*

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED DECEMBER 7, 1994

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-6636

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILFORD HENRY NIECE,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Kentucky

Before: GUY and BATCHELDER, Circuit Judges; and McKEAGUE, District Judge.*

PER CURIAM. This is the second appeal in this case. In the first appeal, this Court affirmed defendant Wilford Henry Niece's conviction for having transported a minor in interstate commerce for illicit sexual purposes, in violation of 18 U.S.C. § 2423. *United States v. Niece*, 9 F.3d 110 (table), No. 93-5011, slip op., 1993 WL 424960 (6th Cir. 1993) (per curiam). Because we found that one of five assignments of error was meritorious, however,

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* Honorable David W. McKeague, United States District Court for the Western District of Michigan, sitting by designation.

we vacated the sentence and remanded for resentencing. Defendant-Appellant now contends the district court erred on resentencing by refusing to apply the sentencing guidelines then in effect, as required by 18 U.S.C. § 3553(a)(4). For the reasons that follow, we affirm the sentence of the district court.

The threshold and, indeed, dispositive question concerns the meaning and effect of this Court's order vacating and remanding.

When the district court originally sentenced defendant on December 22, 1992, it applied the version of the guidelines that became effective on November 1, 1990, instead of the 1992 revised version, to avoid violating the *ex post facto* clause of the Constitution. *Miller v. Florida*, 482 U.S. 423, 431 (1987); *United States v. Kussmaul*, 987 F.2d 345, 351-52 (6th Cir. 1993). Defendant did not object to this determination at the time and he was deemed to have waived his right to raise the objection for the first time on appeal. *Niece, supra*, slip op. at 14. We also found no error in the district court's decision to increase the offense level based on "victim vulnerability" under U.S.S.G. § 3A1.1. *Id.* at 18-19.

We concluded the district court had erred, however, when it increased the offense level by four levels based on "economic coercion" under U.S.S.G. § 2G1.2. Specifically, we stated:

> Without the four-level increase under § 2G1.2, Mr. Niece's offense level would have been 22. The guideline range for this level, in the case of a person in Criminal History Category I, is imprisonment for 41-51 months. Mr. Niece having been sentenced to a term of 72 months, it appears that his sentence was at least 21 months too high.

Id. at 18. It was on this basis alone that we vacated the sentence. We refrained from addressing appellant's challenge to the fine imposed as unnecessary:

> In view of the fact that a resentencing is required in any event, we need not address this claim. We shall vacate the sentence in its entirety, including the fine, and give the district court an opportunity to revisit the question of a fine under the newly-set offense level.

Id. at 20.

On resentencing, the district court construed our mandate narrowly, as essentially requiring resentencing within the guideline range of 41 to 51 months, as dictated by an offense level of 22 and criminal history category of I, pursuant to the 1990 version of the guidelines. The district court further understood that it was required, given the established offense level of 22, to make formal fact findings regarding defendant's ability to pay before imposing an appropriate fine. The district court understood that all other aspects of the original sentencing had been affirmed and considered it unnecessary and inappropriate to revisit any other aspects. The district court thus denied defendant's request to apply the 1993 version of the guidelines. Appellant contends the district court's application of incorrect guidelines is reviewable error *per se*.

Under 18 U.S.C. § 3553(a)(4), a sentencing court is generally required to apply the sentencing guidelines in effect at the time of sentencing. See also U.S.S.G. § 1B1.11(a); *United States v. Clemons*, 999 F.2d 154, 158 (6th Cir. 1993). This rule has

generally been held to apply on resentencing as well. See *United States v. Fagan*, 996 F.2d 1009, 1018 (9th Cir. 1993) (collecting cases). As the district court held at the original sentencing, and we affirmed, an exception to this rule is recognized where amendments to the guidelines made after commission of a crime would result in punishment more severe than that provided for at the time the crime was committed. Another exception is recognized where the resentencing court's authority is explicitly limited by the appellate court's mandate. The "mandate rule" requires lower courts to adhere to the commands of a superior court. *United States v. Moored*, __ F.3d __, No. 93-2230, slip. op. at 4-5, 1994 WL 592105 (6th Cir. Nov. 9, 1994). "The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Id.*, p.5, quoting *United States v. Kikumura*, 947 F.2d 72, 76 (3rd Cir. 1991).

Thus, although many circuits have held that an order vacating a sentence and remanding for resentencing authorizes fully *de novo* resentencing, see *Moored*, collecting cases at p. 6, the appellate court may limit such authority by specific instruction. See e.g., *United States v. Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994); *United States v. Badaracco*, 954 F.2d 928, 943-44 (3rd Cir. 1992).

Here, the mandate returned to the district court is admittedly ambiguous. It contains language explicitly upholding portions of the sentence, language vacating it in its entirety, and specific instruction, impliedly based on the 1990 version of the guidelines, concerning the appropriate offense level and guideline range to be employed and fact findings to be made.

After careful review of this Court's earlier ruling, we

conclude that the district court's construction of it is reasonable and proper. Although the remand order does not expressly direct the district court to apply the 1990 version of the guidelines, it contains implied limitation to this effect. *Cf. United States v. Caterino,* 29 F.3d 1390, 1394-95 (9th Cir. 1994). In viewing its resentencing authority to have been narrowly circumscribed, the district court conscientiously considered the circumstances embraced by the opinion and appropriately implemented the letter and the spirit of the mandate. We find no error in the decision to apply the 1990 version of the guidelines under the circumstances of this case.

Accordingly, the judgment of sentence is **AFFIRMED.**

APPENDIX C — MODIFIED JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, PIKEVILLE FILED DECEMBER 9, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CRIMINAL ACTION NO. 92-22-1

UNITED STATES OF AMERICA,

PLAINTIFF,

VS:

WILFORD HENRY NIECE,

DEFENDANT.

MODIFIED JUDGMENT

Pursuant to the United States Sixth Circuit Court of Appeals' Mandate issued November 10, 1993, remanding the matter for re-sentencing, proceedings were held on December 7, 1993, with Assistant United States Attorney, David P. Grise, being present on behalf of the United States. The defendant was present, in custody, with his attorneys, Bennett Bayer and L.M. Michael Caudill. The proceedings were recorded by Court Reporter, Margaret Varney. Accordingly, it is

ORDERED AND ADJUDGED that on Page 2 of the judgment of December 22, 1992, same being Imprisonment be, and hereby is, **MODIFIED** as follows:

Appendix C

IMPRISONMENT: FIFTY-ONE (51) MONTHS

IT IS FURTHER ORDERED that on Page 4 of the judgment of December 22, 1992, same being Fine be, and hereby is, **MODIFIED** as follows:

FINE: SIXTY THOUSAND ($60,000.00) DOLLARS

Said fine to be paid in installments of $15,000.00 per year. The first payment shall be due and owing one-year from the date of this date. Payments shall be paid under the provisions of the Bureau of Prisons Inmate Financial Responsibility Program during the period of incarceration. Upon release, payments shall be paid in installments until paid in full. Payments should be made to the U.S. District Clerk, P.O. Box 3074, Lexington, Kentucky 40596 and please include your case number.

IT IS FURTHER ORDERED that on Page 5 of the above said judgment, same being Statement of Reasons be, and hereby is, **MODIFIED** as follows:

STATEMENT OF REASONS:

Total Offense Level: 22
Imprisonment Range: 41 to 51 months
Fine Range: $7,500. to $75,000.

IT IS FURTHER ORDERED that all other aspects of said judgment remain unchanged.

This the 9th day of December, 1993.

Appendix C

s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE
UNITED STATES DISTRICT COURT

Date of Entry and Service: DEC 09 1993

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 19, 1993

No. 93-5011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILFORD H. NIECE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed _____

BEFORE: MILBURN and NELSON, Circuit Judges, and GILMORE, Senior District Judge.*

PER CURIAM. A jury found the appellant in this case guilty of having violated 18 U.S.C. §2423, a statute that prohibits the transportation of minors in interstate commerce for illicit sexual purposes. Pointing to alleged evidentiary errors at trial and alleged mistakes in the application of the sentencing guidelines,

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* The Honorable Horace W. Gilmore, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

the appellant challenges both his conviction and his sentence. We shall affirm the conviction. Concluding that the appellant's offense level was miscalculated, however, we shall remand the case for resentencing.

I

A two-count indictment was returned against the appellant, Wilford H. Niece, in May of 1992. The first count charged that between May 26 and July 25, 1991, Niece violated 18 U.S.C. §2423 by transporting a 14-year-old girl from Kentucky to Virginia with the intent that she engage in sexual activity in violation of §18.2-63 of the Virginia Code.[1] The second count charged him with having violated 18 U.S.C. §924(c) by carrying or using a handgun during and in relation to a crime of violence (*i.e.*, the crime charged in the first count). Mr. Niece pleaded not guilty to both charges.

When the case was submitted to the jury following trial, Mr. Niece was convicted on the first count and acquitted on the second. Applying the version of the United States Sentencing Guidelines that became effective on November 1, 1990, the

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1. Section 18.2-63 makes it a crime for any person to "carnally know[], without the use of force, a child 13 years of age or older but under 15 years of age." 18 U.S.C. §2423 reads as follows:

> "Whoever knowingly transports any individual under the age of 18 years in interstate of foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than ten years, or both."

district court sentenced him to imprisonment for six years and imposed a fine of $75,000.

II

A

Both defendant Niece and his young victim lived in Letcher County, Kentucky, which borders on the Commonwealth of Virginia. Mr. Niece was a half-owner of the "Poverty House" restaurant, located in Wise County, Virginia, a few miles over the border. He and his family and the girl and her family attended a church situated on the state line.

The families became acquainted through their church activities, and Niece's stepdaughter befriended the victim and her sister. Beginning in 1990, the two girls (then 14 and 15 years old respectively) were routinely invited to visit the Niece home on Sundays after church. It seems to have been an attractive place; Mr. Niece, who had business interests that included coal mining and trucking, owned a large house with a swimming pool, a tennis court, an exercise room, a collection of antique cars, and a stable of riding horses.

The victim testified at trial that on November 4, 1990, during one of her Sunday visits, she began a sexual relationship with Mr. Niece. (Mr. Niece was then about 50 years old.) The following summer, while the victim was out of school for vacation, she and Mr. Niece began meeting twice a week. Niece would pick her up in a pickup truck and drive her across the state line to the Poverty House. There, in an apartment attached to the restaurant, they would engage in sexual intercourse.

Appendix D

As far as the period covered by the indictment is concerned, it is clear that the relationship was consensual in nature. It was generally the girl who called Mr. Niece to arrange their meetings, and she knew the purpose of the Poverty House visits in advance. She did not resist going there. She testified further that Niece said he loved her and promised to give her a house and a Mercedes automobile when she turned 18.

There was evidence that Mr. Niece carried a pistol in the cab of his pickup truck. The prosecution did not contend that the victim was threatened with the weapon, but Niece did once tell her, according to her testimony, that the gun was to "take care of . . . bigmouthed women."

The victim's mother learned of the trysts in mid-July of 1991. The trips to Virginia ended at that point, and the FBI was informed of the case. There is evidence that when Niece learned that the FBI had been called, he asked his stepdaughter and another friend of hers not to cooperate with the authorities. He told the stepdaughter that he would be angry if she got him in trouble, but that if she did not cooperate with the FBI she could "have anything [she] wanted." He asked the friend not to tell the grand jury what she had told the FBI. If she helped him, Niece told her, "then maybe later on down the road I can help you or I can do a favor for you."

At trial the government introduced tape recordings of telephone conversations between Mr. Niece and the victim. In these recordings, made by the victim in 1992, Niece appeared to acknowledge the sexual misconduct and implored the girl not to cooperate with the FBI investigation.

Appendix D

B

The United States gave notice prior to trial that it intended to offer "other bad act" evidence under Federal Rule of Evidence 404(b).[2] Mr. Niece moved that such evidence be suppressed. After *in camera* consideration of the proposed evidence, the trial court denied the motion: "The alleged prior bad acts are relevant as to the defendant's *modus operandi*," the court wrote, "and the probative weight of such evidence would outweigh the prejudicial effect to the defendant."

At trial, over a renewed objection by Mr. Niece, the government called as witnesses the victim's sister and a young female to whom we shall refer as "L.A." The latter testified that when she was "anywhere from 15 to 17" years old, the defendant told her that "he had heard that [she] was good in bed" and offered to pay her $500 if she would meet him at a motel in Virginia. The victim's sister testified that Niece made explicit sexual advances toward her when she was fifteen years old, inviting her to have sex with him at the Poverty House and elsewhere. The sister testified that Niece offered in return to let her drive his Corvette whenever she wanted to, once she had her driver's license.

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2. Fed. R. Evid. 404(b) provides as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." The prosecution provided the appropriate pretrial notice here.

Appendix D

At the time the sister's testimony was given, the trial judge admonished the jury as follows:

> "You may not consider this evidence to prove the defendant did the acts he is on trial for now. You may consider the other acts only for determination that they occurred for proof of intent or plan on his part and no other reason.
>
> Remember, the defendant is on trial here for the acts charged in the indictment, not for these other acts. Do not convict him if the government has failed to prove these charges beyond a reasonable doubt."

The court gave no similar admonition in connection with L.A.'s testimony. In its instructions to the jury at the close of the trial, however, the court gave this charge:

> "You've heard testimony that the defendant's committed some acts other than the ones charged in the indictment. You cannot consider this testimony as evidence that the defendant committed the crimes that he is on trial for now. Instead, you can only consider it in deciding whether the defendant had the intent to commit the charge in Count 1 (the §2423 charge). Do not consider it for any other purpose. Remember that the defendant is here on trial only for transporting [the victim] across the state line for the purpose of illegal sexual conduct and for using or

> carrying a firearm in relation to that crime, not for the other acts. Do not return a guilty verdict unless the government proves the crimes charged beyond a reasonable doubt."

Following his conviction on the charge of having violated §2423, Mr. Niece was sentenced under the version of the sentencing guidelines that became effective on November 1, 1990. The court determined that use of a later edition would result in a sentence greater than that allowable at the time of the offense, in violation of the Constitution's *ex post facto* clause. U.S. Const. Art. I, §9.

Applying §2G1.2 of the guidelines, the court fixed Niece's base offense level at 16. The court then added two levels under U.S.S.G. §2G1.2(b)(3) because the victim was twelve to fifteen years old. An additional increase of four levels was imposed under §2G1.2(b)(1), the court having determined the offense involved the use of "economic coercion." Two further increases of two levels each were imposed, one under §3A1.1 (based on a finding that the victim was unusually vulnerable because of Niece's "father figure" relationship to her), and the other under §3C1.1 (based on findings that Niece committed perjury during the trial and attempted to influence two prosecution witnesses in advance of trial). The total offense level thus came to 26. Mr. Niece had no prior criminal history of any significance, and the absence of such a history resulted in his being placed in Criminal History Category I.

The sentence range prescribed by the guidelines for these variables was imprisonment for a period of 63-78 months. The court imposed a sentence of 72 months and a fine of $75,000.

Appendix D

III

A

Mr. Niece contends first that the "other act" evidence presented through the testimony of L.A. and the victim's sister was inadmissible under Fed. R. Evid. 404(b). Because this evidence was relevant to the issue of the defendant's intent, however, and because the trial court was entitled to conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, see Fed. R. Evid. 403, we find no reversible error.

Under the principle embodied in Rule 404(b), as Justice Jackson explained in *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

> "The state may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

Rule 404(b) is primarily a rule of inclusion, however, rather than a rule of exclusion; by its terms, evidence of other acts "may . . . be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evidence admitted for such purposes is not admitted to show the defendant's character.

Before admitting "other act" evidence under Rule 404(b), the court must undertake a two-step analysis. First, it must determine whether the evidence is admissible for a proper purpose. *United States v. Feinman*, 930 F.2d 495, 499 (6th Cir. 1991). "The evidence must relate to a matter which is in issue and must deal with conduct substantially similar and reasonably near in time to the offenses for which the defendant is being tried." *Id.* The proffered evidence meets the test of admissibility for a proper purpose if the "evidence is probative of a material issue other than character." *Id.* (quoting *Huddleston v. United States*, 485 U.S. 681, 686 (1988)).

The second step of the analysis requires the court to balance the probative weight of the evidence against the dangers referred to in Fed. R. Evid. 403. Rule 403 provides as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." If the unfairly prejudicial effect of the "other act" evidence predominates over its probative value, then the trial court must reject it. *United States v. Rodriguez* 882 F.2d 1059, 1064 (6th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990). We review the district court's rulings on such questions under an abuse of discretion standard. *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992).

Mr. Niece argues that the "other act" evidence presented

through the testimony of L.A. and the victim's sister was not admissible for a proper purpose. Focusing on the pretrial order denying the motion to suppress the girls' testimony, he points to the fact that the order said the evidence was admissible to prove Niece's "*modus operandi*." A prosecutor is only allowed to introduce *modus operandi* evidence, Mr. Niece argues, to identify the accused as the perpetrator of a crime; by showing a similar pattern, the prosecutor attempts to show that the same person was involved in each instance. Identity was not at issue here, of course, so Mr. Niece says that *modus operandi* evidence was inadmissible. See *United States v. Fountain*, 1993 U.S. App. LEXIS 20219 at *33-34 (6th Cir. Aug. 9, 1993) (holding "*modus operandi*" evidence inadmissible where identity not at issue).

The problem with this argument is that the instructions given to the jury did not deal with *modus operandi*. The jury was repeatedly instructed that the evidence was to be considered only in connection with the question of plan or intent. As far as the jury was concerned, the testimony of the two girls was admitted only as proof that Niece intended or planned to take the victim to Virginia for the purpose of committing illegal sexual acts with her there.

18 U.S.C. §2423 is a specific intent offense. The prosecution had the burden of proving beyond a reasonable doubt that when Niece crossed the state line with the victim in his truck, he did so intending that she engage in proscribed sexual activity with him on the other side of the line. See *United States v. Vik*, 655 F.2d 878, 881-82 (8th Cir. 1981). Where specific intent is a necessary element of the crime charged, a general plea of not guilty places intent at issue and makes intent a "proper purpose" for which extrinsic act evidence can be offered. *United States v. French*, 974 F.2d 687, 695 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1012

(1993); *United States v. Hamilton*, 684 F.2d 380, 384 (6th Cir.), *cert. denied*, 459 U.S. 976 (1982); *United States v. Smith*, 995 F.2d 662, 672 (7th Cir. 1993).

The prior acts recounted by the two girls here were sufficiently similar in nature and near in time to the alleged criminal conduct to be admissible under Rule 404(b). "[W]here evidence of prior bad acts is admitted for the purpose of showing intent, the prior acts need not duplicate exactly the instant charge, but need only be sufficiently analogous to support an inference of criminal intent." *United States v. Benton*, 852 F.2d 1456, 1468 (6th Cir.), *cert. denied*, 488 U.S. 993 (1988). Both L.A. and the victim's sister described instances where Niece had proposed having sexual intercourse in the Commonwealth of Virginia with minor females who were friends of his family. Like the conduct covered by the indictment, the sexual favors allegedly solicited from the witnesses would have violated Virginia law. The incidents described by the two girls tended to prove that Mr. Niece's conduct with the victim was not simply fortuitous — that when he transported her into Virginia, he did so with the intent that she go to bed with him there. See *United States v. Drury*, 582 F.2d 1181, 1184-85 (8th Cir. 1978) ("in order to establish the intent required for a [violation of the] Mann Act [a statute identical to §2423 except for the age requirement], the prosecution may admit into evidence testimony that the defendant had solicited girls on prior occasions"). *Cf. United States v. Jarrett*, 956 F.2d 864, 867 (8th Cir. 1992) (same).

The trial court did not abuse its discretion in determining that the danger of unfair prejudice or confusion did not substantially outweigh the probative value of the extrinsic act evidence. As the Supreme Court has recognized, "[e]xtrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue,

especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." *Huddleston v. United States*, 485 U.S. 681, 685 (1988). Such was the case here. We recognize that evidence of other instances of illegal sexual conduct may have a greater potential for prejudice that "other acts" evidence of a less repugnant nature, see 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶404[18] (1992), but the balance struck by the district court in this case did not represent an abuse of discretion and the cautionary instructions given the jury tended to minimize the risk of unfair prejudice. After considering the record of the trial as a whole, we are not persuaded that the admission of the "other acts" evidence entitles Mr. Niece to a new trial.

B

Mr. Niece contends next that the trial court erred in applying Fed. R. Evid. 412, the federal rape shield rule, to prevent interrogation of the victim about her prior sexual history. Again we are not persuaded; we do not think the trial court was required to let the jury hear the testimony which Mr. Niece wanted to elicit.

Niece sought to show that the victim was not a virgin when he began his relationship with her. He contended that such evidence would have a bearing on her credibility, because she had "stated at least on 2 or 3 other occasions [outside the courtroom] . . . that she had never had sex with anyone other than Mr. Niece." Niece wanted to impeach the girl's credibility by showing that she had not been truthful in her alleged extrajudicial statements. The trial court sustained the prosecution's objection on the basis of Fed. R. Evid. 412.

Appendix D

The text of Rule 412(b), the subsection at issue here, begins as follows:

> "Notwithstanding any other provision of law, *in a criminal case in which a person is accused of any offense under chapter 109A of title, 18, United States Code*, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible. . . ." (Emphasis added.)

Before an amendment that became effective in 1988, the italicized passage had read "in a criminal case in which a person is accused of rape or of assault with intent to commit rape."

By its plain and unambiguous language, Rule 412 now applies only to prosecutions brought under Chapter 109A of Title 18. The crimes with which Niece was charged are not covered by that chapter. The section he was found to have violated, 18 U.S.C. §2423, is part of Chapter 117. The section he was found not to have violated, 18 U.S.C. §924(c), is codified in Chapter 44.

Regardless of the applicability of Rule 412, however, the trial court clearly had discretion to exclude the evidence which Mr. Niece was trying to place before the jury. The victim said nothing about her sexual history during direct examination. Niece's strategy was to ask her on cross-examination whether she had lost her virginity before Niece came along, elicit a denial, and then adduce extrinsic evidence to impeach her denial. The trial court took a dim view of this strategy:

> "She might have had sex with 3 or 4 people. That may well be. But it is simply not relevant here."

Appendix D

Although litigants are entitled to introduce extrinsic evidence to contradict a witness' testimony on matters that are material to the merits of a case, they have no right to do so with respect to collateral or irrelevant matters. *Jones v. Southern Pacific R.R.*, 962 F.2d 447, 450 (5th Cir. 1992). Interjection of such matters may confuse the jury, and if the collateral matters reflect adversely on the morals of the witness, the jury may be prejudiced against the witness' side. 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* §607[05] (1992). In light of the "significant discretion left to the trial court" in determining the proper scope of impeachment evidence on collateral matters, we cannot say that the court abused its discretion in excluding evidence of the victim's sexual history. See *United States v. Markarian*, 967 F.2d 1098, 1103 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1344 (1993).

IV

The sentence imposed by the district court is challenged here on the following grounds: (1) that the district court erred in applying the 1990 edition of the sentencing guidelines rather than the version in effect at the time of trial; (2) that the court violated Niece's Fifth Amendment rights by treating the imposition of a prison term as mandatory; (3) that it was improper to increase the offense level on the basis of "economic coercion;" (4) that the "vulnerable victim" increase was improper; and (5) that the fine was imposed improperly.

A

As the government correctly observes, Mr. Niece waived any argument against the application of the 1990 version of the sentencing guidelines by failing to make a timely objection to the

use of that version. A presentence report furnished to Mr. Niece prior to sentencing stated clearly that the 1990 guidelines were to be applied to avoid possible *ex post facto* problems. (Under *Miller v. Florida,* 482 U.S. 423 (1987), guideline amendments that have taken effect after the commission of a crime may not be applied to increase the punishment beyond that provided for at the time the crime was committed. Subject to that exception, a court is required to apply the version of the guidelines in effect at the time of trial. 18 U.S.C. §3553(a)(4).)

Mr. Niece filed six pages of written objections to the report, but these objections did not extend to use of the 1990 guidelines. At the sentencing hearing, the judge specifically referred to the 1990 guidelines:

> THE COURT: . . . The base offense level in this matter is a level 16 as set forth in the November 1, 1990 edition of the Sentencing Guidelines.
>
> There's no problem with that base offense level, is there?
>
> MR. GRISE [AUSA]: No. Judge.
>
> MR. BAYER [Defendant's counsel]: I think that's probably appropriate to begin with, Judge."

No objection to using the 1990 guidelines was made at any point in the sentencing hearing. On appeal, however, Mr. Niece contends for the first time that the 1992 guidelines would have yielded a lower sentence than the one he received under the 1990 version.

Appendix D

Except where plain error has occurred, it is the general practice of this court not to consider on appeal issues not raised before the trial court. *United States v. Pickett*, 941 F.2d 411, 415 (6th Cir. 1991); *United States v. Chalkias*, 971 F.2d 1206, 1212 (6th Cir.), *cert. denied*, 113 S. Ct. 351 (1992). Plain error includes only such errors as "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Young*, 470 U.S. 1, 15 (1985). The circumstances of this case are not such as to trigger the plain error exception.

B

Mr. Niece argues that his Fifth Amendment due process rights were violated by an application of the sentencing guidelines that made a prison term mandatory. 18 U.S.C. §2423 provides that a violator is to be "fined under this title or imprisoned not more than ten years, or both," and the indictment reiterated that Mr. Niece was subject to either ten years' imprisonment, a fine, or both. Mr. Niece says that he was deprived of his liberty without due process because the indictment failed to give him notice that conviction would result in mandatory imprisonment under the guidelines.

Mr. Niece has cited no case, and we know of none, holding that an indictment must specify the maximum and minimum penalties to which the accused would be subject upon conviction. All that is required is that an indictment "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). These requirements were met here.

Appendix D

Rule 7 of the Federal Rules of Criminal Procedure, which governs indictments, does not require that a penalty be specified. Mr. Niece was nonetheless informed by the indictment that he might be imprisoned for up to ten years and fined up to $250,000. This information was accurate, and we see no constitutional infirmity in the sentence imposed.

C

Mr. Niece contends next that it was error for the district court to impose a four-level increase in the offense level under U.S.S.G. §2G1.2. Section 2G1.2 reads as follows: "If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by four levels."

The theory under which the court found this increase proper was that Niece had used "economic coercion" against his victim when he promised to buy her a car and otherwise provide for her materially after she turned eighteen. The court stated that Niece's promises "had an impact on the voluntariness of her conduct" warranting the increase.

Niece argues that "economic coercion" of the type discerned by the trial court does not fall within the scope of §2G1.2. He points to abundant evidence that the victim's conduct was not involuntary, as well as the absence of any evidence that he used physical threats or force against her. He notes that the supposed "economic coercion" did not subvert the victim's ability to say "yes" or "no," and he observes that the promises in question were not made until after the course of illegal conduct had commenced, and thus were not instrumental in gaining the victim's consent thereto.

Appendix D

The official commentary on §2G1.2 lends considerable weight to Mr. Niece's argument. What the commentary says is this:

> " 'Coercion,' as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported. This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol."

The nature of "coercion," as recognized by the commentary, is that it deprives an individual of the ability to make choices with reasonable freedom. This is the meaning of "negat[ing] the voluntariness" of behavior. The coercer, in essence, leaves the coerced with but one choice. He does this by threatening an imminent loss of some kind (as by physical threats), or by use of substances (alcohol or drugs) that impair the normal psychophysical processes of reasoning. Neither drugs nor alcohol played any role here, and the trial court found — correctly, no doubt — that Mr. Niece employed no threat of physical force against the victim.

Mr. Niece did not give the victim to understand that she would be worse off if she refused him; he promised to make her better off. Such promises do not foreclose the possibility of choice, at least in the case of someone as old as fourteen. We are satisfied that the promises did not deprive the victim of the ability "to appraise or control" her conduct. There appears to be no caselaw supporting the conclusion that §2G1.2(b)(1) extends to promises of future bounty, and based on the age of the victim and

the context and everyday meaning of the terms involved, we hold that §2G1.2 should not have been invoked here.

Without the four-level increase under §2G1.2, Mr. Niece's offense level would have been 22. The guideline range for this level, in the case of a person in Criminal History Category I, is imprisonment for 41-51 months. Mr. Niece having been sentenced to a term of 72 months, it appears that his sentence was at lease 21 months too high.

D

Mr. Niece contends next that the district court should not have increased the offense level under §3A1.1. Section 3A1.1 says this "If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels." The district court did not invoke the victim's age, which had already been accounted for in the two-level increase under §2G1.2(b)(3). The court relied, rather, on what it described as the defendant's "father figure" relationship to the victim.

Numerous cases confirm that the vulnerability upon which a §3A1.1 enhancement is predicated need not be restricted to the specifically enumerated factors of age or physical or mental condition. In *United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989), this court approved a victim vulnerability enhancement based on the race of the victims and the location of their residence. In *United States v. Chick*, No. 90-2200, 1992 U.S. App. LEXIS 3350 (6th Cir., Feb. 14, 1992), we affirmed such an enhancement based on a former marital relationship between the defendant and his victim. In *United States v. Williams*, No. 91-1989, 1992 U.S. App.

LEXIS 12109 (6th Cir., May 19, 1992), a case involving the smuggling of illegal aliens, we upheld a vulnerability enhancement based on "language barriers and cultural limitations" experienced by the aliens and on their separation from family members while in transit.

The caselaw teaches that the open-ended language of §3A1.1 can justify enhancement whenever the court is faced with a victim who: (1) based on the totality of the circumstances, (2) appears to possess traits that made him or her particularly susceptible to being victimized, (3) by the kind of criminal conduct that actually occurred, (4) where the traits in question played a significant role in the individual's being singled out for victimization by the criminal perpetrator. A quasi-familial "father figure-daughter" relationship does not fall outside the range of relationships upon which a finding of victim vulnerability can be predicated, given appropriate evidence and factual findings.

In the case at bar the district court's determination that the victim was particularly susceptible was based on evidence that Niece held himself out to the family as a kind of surrogate father and that he was accepted as such by the victim and her sisters; that in their eyes he occupied a position of trust; and that he enjoyed unusual access to their company. The court's finding of victim vulnerability was not clearly erroneous.

E

Mr. Niece maintains, finally, that the court erred in imposing a fine without making any formal findings under §5E1.2(d). In view of the fact that a resentencing is required in any event, we need not address this claim. We shall vacate the sentence in its

entirety, including the fine, and give the district court an opportunity to revisit the question of a fine under the newly-set offense level.

We are confident that any imposition of a fine will be handled in accordance with the requirements of §5E1.2. That section requires a district court to consider several factors in imposing a fine, but creates a presumption is favor of a fine sufficient to have a punitive impact. In light of this presumption, a court is to consider such issues as the defendant's ability to pay, the burden that a fine would place upon the defendant's family, and collateral consequences (such as civil liability) arising from the criminal conduct. See generally *United States v. Hopper*, 941 F.2d 419, 423 (6th Cir. 1991).

The conviction is **AFFIRMED**, the sentence is **VACATED**, and the case is **REMANDED** for resentencing.

A TRUE COPY

Attest:
LEONARD GREEN, Clerk
By s/ Diane Schneer
Deputy Clerk

ISSUED AS MANDATE: 11/10/93
COSTS: No Costs

APPENDIX E —RELEVANT PORTIONS Of ORIGINAL JUDGMENT OF UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY - PIKEVILLE FILED DECEMBER 22, 1992

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY - PIKEVILLE

Case Number: 92-22-1

UNITED STATES OF AMERICA

V.

WILFORD HENRY NIECE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Defendant's Attorney: Bennett Bayer/Mike Caudill

THE DEFENDANT:

X was found guilty on count *one (1) of indictment* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: *18 USC §2423*

Nature of Offense: *transported an individual minor in interstate commerce with intent that such minor individual engage in sexual activity.*

Appendix E

Date Offense Concluded: *7/25/91*

Count Number(s): *1*

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count *two (2) of indictment* and is discharged as to such count(s).

X It is ordered that the defendant shall pay a special assessment of *$50.00* for *Count one*, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: *406-58-6662*

Defendant's Date of Birth: *11-27-40*

Defendant's Mailing Address: *HC 85, Box 2650*
Whitesburg, Kentucky 41858

Date of Imposition of Sentence: *December 21, 1992*

Signature of Judicial Officer: *s/ Joseph M. Hood*

Name & Title of Judicial Officer: *JOSEPH M. HOOD, JUDGE*

Date: *December 22, 1992*

Appendix E

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *SEVENTY-TWO (72) MONTHS.*

The court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated at FCI at Manchester, Kentucky. It is also recommended that the defendant receive while incarcerated treatment for his unnatural affinity for young women.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: *before 4:00 p.m. on January 4, 1993.*

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *THREE (3) YEARS.*

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

Appendix E

X The defendant shall not possess a firearm or destructive device.

The defendant shall report in person to the probation office in the district to which the defendant is released within 24 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit any local, state or federal crimes.

The defendant shall continue his treatment for his unnatural affinity for young women.

* * *

FINE

The defendant shall pay a fine of *$75,000.00*. The fine includes any costs of incarceration and/or supervision.

* * *

This fine plus any interest required shall be paid: *in full immediately.*

* * *

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except: *The Court increases the offense 4 levels for psychological coercion and increases the offense 2 levels for vulnerable victim pursuant to 2G1.2(b)(1) and 3A1.1 of the U.S.S.G.*

Appendix E

Guideline Range Determined by the Court:

Total Offense Level: *26*

Criminal History Category: *1*

Imprisonment Range: *63* to *78* months

Supervised Release Range: *2* to *3* years

Fine Range: $*12,500.* to $*125,000.*

Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ *none*

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

Certificate of Mailing w/Notice of Entry & Certification:
U. S. Attorney
U. S. Marshal 2 certified and sealed
U. S. Probation
Thomas L. Rasnic
Bennet Bayer
Wilford Niece

APPENDIX F — RELEVANT STATUTORY TEXT

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35. Correction or Reduction of Sentence

(a) **Correction of a Sentence on Remand.** The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court —

> (1) for imposition of a sentence in accord with the findings of the court of appeals;

or

> (2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

UNITED STATES CODE

18 U.S.C. § 3553 Imposition of a Sentence.

(a) **Factors to be considered in imposing a sentence. —** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider —

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines

that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced; . . .

18 U.S.C. § 3742 Review of a Sentence

(e) **Consideration.** — Upon review of the record, the court of appeals shall determine whether the sentence —

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside of the applicable guideline range, and is unreasonable, having regard for —

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they

are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) **Decision and disposition.** — If the court of appeals determines that the sentence —

> (1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
>
> (2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and —
>
> > (A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
> >
> > (B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with

such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. § 1B1.11. *Use of Guidelines Manual in Effect on Date of Sentencing* (Policy Statement).

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b)(1) if the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines manual. However, if a court applies an earlier addition of the Guidelines Manual, the court shall consider

subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.